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In the Supreme Court of the United States

OCTOBER TERM, 1933.

No. [redacted] 32

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, DAVID B. ROBERTSON, TIMOTHY SHEA AND ALBERT PHILLIPS,
Petitioners,

vs.

ELLA E. PINKSTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals For the Sixth Circuit, and

BRIEF IN SUPPORT OF PETITION.

THOMAS STEVENSON,
Guarantee Title Bldg.,
Cleveland, Ohio,
Attorney for Petitioners.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

INDEX.

PETITION FOR WRIT OF CERTIORARI:

Summary and Short Statement of the Matter Involved 2

Reasons Relied on for the Allowance of the Writ..... 4

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI:

Statement of the Case..... 7

Point I. The Decision of the Circuit Court of Appeals Holding that the Jurisdictional Amount Is Involved is Contrary to the Weight of Authority and in Conflict with Applicable Decisions of this Court 9

Point II. The Decision of the Circuit Court of Appeals Holding that the Contingent Future Payments May Be Taken into Account in Determining the Value of the Matter in Controversy Is Contrary to the Weight of Authority and in Conflict with Applicable Decisions of this Court..... 11

Point III. There Is No Decision of this Court Nor of a Circuit Court of Appeals Deciding the Question as to Whether or Not Future Contingent Payments May Be Reckoned to Acquire the Requisite Jurisdictional Amount 13

Conclusion 14

Authorities Cited in Petition.

Elgin v. Marshall, 106 U. S. 578..... 4

Wright v. Mutual Life Insurance Company, 276 U. S. 602 4

1 *Cyc. of Fed. Proc.*, Sec. 66..... 4

Authorities Cited in Brief.

Elgin v. Marshall, 106 U. S. 578..... 10

Thompson v. Thompson, 226 U. S. 551.....9, 11

Wright v. Mutual Life Insurance Company, 19 Fed. (2d) 117, affirmed in a Memorandum Opinion by this Court in 276 U. S. 602..... 10

1 *Cyc. of Fed. Proc.*, Sec. 66..... 11

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Petitioners,

vs.

ELLA E. PINKSTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Charles Evans Hughes, Chief Justice, and Associate Justices of the Supreme Court of the United States:—

Ella E. Pinkston, Respondent, is the designated beneficiary in a matured Widow's Pension Certificate issued to her deceased husband by the Brotherhood of Locomotive Firemen and Enginemen. The Certificate is contingent by its terms as it provides for monthly payments for life provided the beneficiary does not remarry. Should she remarry the payments cease. Respondent brought suit in Equity against your Petitioners in the District Court of the United States for the Northern District of Ohio, Eastern Division, praying for a Receiver, a Declaration of Trust, an accounting and an injunction. The case was tried before the Hon. Samuel H. West who entered an Order dismissing the case on the ground of no jurisdiction on the part of the Court.

From this judgment and Order the Respondent appealed to the United States Circuit Court of Appeals for

the Sixth Circuit. That Court entered a final decision on the 8th day of March, 1934, reversing the Decree of the District Court. A Petition for Rehearing was denied on April 10th, 1934. Your Petitioners pray for a Writ of Certiorari and review of the Order and Decree of the United States Circuit Court of Appeals for the Sixth Circuit, entered as aforesaid, a certified copy of the record and proceedings whereof we are filing and presenting herewith.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

The Petitioner, Brotherhood of Locomotive Firemen and Enginemen, is a voluntary association of men employed as locomotive firemen and enginemen, a hazardous occupation, and is a labor union. It operates and has operated several departments in the nature of fraternal benefit societies, one of which was designated the Widow's Pension Department, which was operated as a separate, self-contained Department from January 1st, 1926 up to July 31st, 1931.

The Certificates provide that, upon the death of the member, the beneficiary (widow or widowed mother) is entitled to receive from the Funds of the Department a Pension of $35.00 per month during her life time,

> "provided she does not remarry. Should she remarry, the payment of such pension shall cease."

An actuarial study of the Department and its experience, made in 1930, disclosed it was only about Five Per Cent (5%) solvent. At that time there were over 6,000 members paying dues into the Department and about 78 widows or widowed mothers holding matured Certificates and in receipt of benefits. Assets in the Department were about $313,000.00 while the liabilities on account of claims then being paid amounted to over $327,000.00.

In view of that experience and the degree of insolvency it was resolved by the Brotherhood at its Convention in June and July, 1931, to discontinue the Department as of August 1st, 1931. The same Convention established a new Benevolent Fund, compulsory upon all members of the Brotherhood, about 80,000 at that time. Briefly stated, the action of the Convention was that the President and General Secretary and Treasurer undertake to make lump sum settlements with each matured Certificate holder, not to exceed $1500.00; where the beneficiary declined such settlement the monthly allowance was to be paid from the new Benevolent Fund provided these monthly payments must continue under the Insurance Laws of the states and that, after such settlements had been made, any remaining assets be distributed to the members of the Department. The President of the Brotherhood, by authority of its Constitution, interpreted this action to mean that the widows would first be settled with out of the Fund before anything else was done. (R. 42, 43.)

To proceed to carry out the resolution of the Convention a communication was sent to each beneficiary on July 31, 1931, advising of the action of the Convention and making certain inquiries. The respondent, a beneficiary, failed to answer and refused to give the Brotherhood any information. She did not advise that she had not remarried nor did she so allege in her original petition, filed September 29th, 1931. Furthermore, it is not specifically and directly alleged in the petition that the value of the matter in dispute is in excess of $3,000.00 exclusive of interest and costs, but only "as hereinafter shown." Plaintiff thereafter alleges and shows that she is entitled to receive $35.00 per month for life *as long as she remains unmarried*; that she is forty (40) years of age and that, based upon her *life expectancy*, her claim has a net present value in excess of $5,000.00.

The District Court held that, as future payments are contingent upon respondent remaining unmarried they may never accrue and therefore the present value of her life expectancy does not represent the amount in controversy. By no possibility could she recover judgment for such a sum. The Court found as a fact that the matter in controversy does not exceed the sum or value of $3,000 exclusive of interest and costs and as a conclusion therefrom that it had no jurisdiction.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. In reversing the Decree of the District Court the Circuit Court of Appeals has decided a question of Federal jurisdiction in a way which we submit is in conflict with applicable decisions of this Court. It has been uniformly held by this Court that the requirements for jurisdiction in a Federal Court are strictly applied. Jurisdiction must clearly appear. All doubts must be resolved against the jurisdiction of the Federal Court as the Judiciary Act was intended to contract the jurisdiction. *Elgin v. Marshall*, 106 U. S. 578; *Wright v. Mutual Life Insurance Company*, 276 U. S. 602.

2. In reversing the Decree of the District Court the Circuit Court of Appeals has decided an important question of general law in conflict with the weight of authority and the established rule. The rule with respect to reckoning future claims or demands to acquire jurisdictional amount is stated in 1 *Cyc. of Fed. Proc.*, Sec. 66 as follows:

> "While future claims and demands, which are contingent in nature and may never accrue can not be reckoned, the controversy embraces future increase or augmentation of the claim or dispute presently made, which will occur in the ordinary course of things."

The remarriage of the plaintiff is not a contingency which is bound to occur in the ordinary course of things. It is a contingency within the volition of the plaintiff. Future payments are not definite and certain but are contingent upon an exercise of the volition of the plaintiff herself. Should the plaintiff choose to remarry, that act in itself would terminate her right to payment. Under the rule stated, the contingent future claims of plaintiff cannot be reckoned.

3. There are special and important reasons why the Writ prayed for should be allowed. The sole question involved, "may future contingent payments be reckoned to acquire the jurisdictional amount," has not been decided by this Court nor by a Circuit Court of Appeals. The decision of the Circuit Court of Appeals in the instant case is probably untenable. This important question should be settled by this Court.

WHEREFORE, your Petitioners pray that a Writ of Certiorari may issue out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding the said Court to certify the above stated cause to this Court for review and determination, as provided by law, and that your Petitioners may have such other and further relief in the premises as to the Court may appear proper.

Respectfully submitted,

THOMAS STEVENSON,

Attorney for Petitioners.

AFFIDAVIT.

STATE OF OHIO,
CUYAHOGA COUNTY, SS:

THOMAS STEVENSON, being first duly sworn says that he is Attorney for the within named Petitioners; that he has read the foregoing Petition and that the facts stated and allegations contained therein are true, as he verily believes.

THOMAS STEVENSON.

Sworn to before me and subscribed in my presence this 5th day of May, 1934.

HAROLD C. HEISS,
Notary Public.

My commission expires May 29, 1934.

I do hereby certify that I prepared and have examined the foregoing Petition for Writ of Certiorari and that in my opinion such Petition is well founded and should be granted by this Honorable Court, and that said Petition is not filed for delay.

Dated this 5th day of May, 1934.

THOMAS STEVENSON.

In the Supreme Court of the United States

OCTOBER TERM, 1933.

No.....

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, DAVID B. ROBERTSON, TIMOTHY SHEA AND ALBERT PHILLIPS,
Petitioners,

vs.

ELLA E. PINKSTON,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The Respondent, (plaintiff below) is the designated beneficiary in a matured Widow's Pension Certificate issued to her deceased husband by the Brotherhood of Locomotive Firemen and Enginemen. By the terms of the Certificate the promised benefits are contingent, being payable only so long as she does not remarry. It is a condition of the Certificate that, if she remarries, payments shall cease.

Being advised by an Actuary that the Widow's Pension Department was only about Five Per Cent (5%) solvent the Brotherhood, in Convention, resolved to discontinue it as of August 1, 1931. The Convention also outlined the manner of disposing of the assets and liabilities of the Department.

At the date of discontinuance of the Department there were about 78 outstanding matured Certificates. Although future payments under these certificates were contingent upon the beneficiaries not remarrying, the Convention pro-

vided that lump sum settlements might be made with the beneficiaries in an amount not to exceed $1500.00.

While August 1st, 1931 was fixed by the Convention as the date of discontinuance, the Brotherhood officers distributed payments for that date. They then proceeded to negotiate with the beneficiaries for lump sum settlements. Every beneficiary with the exception of the plaintiff responded to these proposals. As negotiations for settlements were in progress and the Brotherhood officers confidently expected to consummate settlements with most if not all of the beneficiaries, checks were not sent out on September 1st. Making no response to the inquiries of the Brotherhood the plaintiff filed her suit on September 29th, 1931. The plaintiff failed to advise the Brotherhood that she was still unmarried.

The plaintiff undertakes to bring this suit on her own behalf and on behalf of all other holders of Widow's Pension Certificates similarly situated. No other Certificate holder joined with her at any time. In the Petition, the value of the matter in dispute is not directly and specifically alleged but it is stated that such value "as hereinafter shown" is in excess of $3,000.00 exclusive of interest and costs. (R. 2.) Although plaintiff alleges that she is entitled to a payment of $35.00 per month as long as she should not remarry she did not allege that she had not remarried. That allegation was made by amendment by interlineation by leave of Court on November 28th, 1931. (R. 3.) The bases of the Complaint are (1) the failure to make payment, (2) that the settlements which had been consummated were wrongful, (3) that further wrongful lump sum settlements were contemplated, and (4) that the defendant was about to wrongfully divert the fund.

During the course of the trial in the District Court, in the argument of the case, counsel for plaintiff not only withdrew their objections to the settlements that were made

and proposed but, when it was pointed out by the Court that every settlement increased the value of their claim, they affirmatively consented to the settlements. (R. 111.) At the time this case was reached for argument in the Circuit Court of Appeals, and following the foregoing consent to settlements on behalf of the plaintiff, all except five (5) of the holders of matured Certificates, of whom the plaintiff is one, had accepted the proposed settlements. (R. 144.) Furthermore, each of the five remaining widows, including plaintiff, has been paid monthly benefits from the Widow's Pension Fund in accordance with the terms of her Certificate up to the date of that affidavit, March 31, 1934. (R. 144.)

The District Court held, in a Memorandum Opinion (R. 99) that, as future payments are dependent on the condition that plaintiff remains unmarried and that this is not a contingency that is bound to occur in the ordinary course of things, the future claims could not be reckoned. On Motion for Rehearing that Court rendered another Memorandum Opinion (R. 103) in which the Court considered the case of *Thompson v. Thompson,* 226 U. S. 551 (relied on by the Circuit Court of Appeals), but adhered to its view that it had not jurisdiction.

POINT I.

THE DECISION OF THE CIRCUIT COURT OF APPEALS HOLDING THAT THE JURISDICTIONAL AMOUNT IS INVOLVED IS CONTRARY TO THE WEIGHT OF AUTHORITY AND IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

It has been uniformly held by this Court in a long and unbroken line of decisions that the requirements for jurisdiction in a Federal Court are strictly applied. Jurisdiction must clearly appear. All doubts must be resolved against the jurisdiction of the Federal Court as the Judi-

ciary Act was intended to contract the jurisdiction. A leading case to this effect is *Elgin v. Marshall,* 106 U. S. 578. In that case are given the reasons for the rule of strict construction.

These rules have universally been followed by the Circuit Courts of Appeals. A recent example is the case of *Wright v. Mutual Life Insurance Company,* 19 Fed. (2d) 117, affirmed in a Memorandum Opinion by this Court in 276 U. S. 602. That decision is applicable to the case at bar.

In the *Wright* case, an insurance policy was involved which provided payment to the beneficiary of $30.00 per month for life and for twenty years in any event. It provided for double that amount in the event of accidental death. The beneficiary claimed the insured met with an accidental death and that double benefits were due. This was denied by the Company and suit instituted in the State Court.

The Insurance Company removed the case to the Federal Court which assumed jurisdiction on the ground that, while the Company admitted liability for $30.00 per month, any decision would determine payment of an additional $30.00 per month for 20 years, an amount in excess of the jurisdictional requirement.

The case was appealed to the Circuit Court of Appeals for the Fifth Circuit where the jurisdiction of the Federal Court was again challenged. The Circuit Court of Appeals reversed the District Court holding that the collateral effect of the judgment on the additional amount was not the test of jurisdiction. As stated, that decision was affirmed by this Court upon authority of *Elgin v. Marshall, supra,* and other cases.

In the case at bar the District Court considered the *Wright* case in point. Where there is a doubt that the jurisdictional amount is involved, such doubt should be resolved against the jurisdiction. We submit that the rule affirmed by this Court in the *Wright* case is controlling.

POINT II.

THE DECISION OF THE CIRCUIT COURT OF APPEALS HOLDING THAT THE CONTINGENT FUTURE PAYMENTS MAY BE TAKEN INTO ACCOUNT IN DETERMINING THE VALUE OF THE MATTER IN CONTROVERSY IS CONTRARY TO THE WEIGHT OF AUTHORITY AND IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

It is made quite clear by the opinion of the Circuit Court of Appeals (R. 131) that jurisdiction hinges solely upon the value of the individual right of the plaintiff. The Court specifically states that the matter in controversy is not the accumulated Pension Fund nor the combined claims of all holders of matured certificates. There is no challenge of the rule stated in 1 *Cyc. of Fed. Proc.*, Sec. 66, "future claims and demands, which are contingent in nature and may never accrue cannot be reckoned." The decision of the Court that the contingent future claims in this case can be taken into account to secure jurisdictional amount is based solely upon one decision of this Court, *Thompson v. Thompson,* 226 U. S. 551. That decision was considered by the trial court who held it not applicable. The Circuit Court of Appeals holds it is controlling. We respectfully submit it is distinguishable from the case at bar and is not a departure from the general rule.

In the *Thompson* case the matter in controversy was a Decree for Statutory maintenance requiring the husband to pay the wife $75.00 per month. Jurisdiction was challenged as future payments would have to be reckoned to acquire the jurisdictional amount. This Court points out that statutory maintenance is subject to be modified from time to time or even cut off entirely in the event of a change in the circumstances of the parties, but then pointedly says, with respect to payments provided by a court decree:

> "Nevertheless, such a decree clearly and *finally settles* the obligation of the husband to contribute to the support of the wife and offspring, and *fixes* the amount of contribution required for the present to fulfill that obligation. The future payments are *not* in any proper sense contingent or speculative although they are subject to be increased, decreased, or even cut off, as just indicated." (Italics ours.)

By that holding, this Court specifically took that case outside the rule with respect to contingent future payments. As the future payments were "fixed" by the Court's Decree, this Court held they were not in any proper sense contingent or speculative. Even though the future payments were subject to modification, there was no qualification of the right to the payment and no act of the wife nor any changed circumstances would, by their own force, affect the payment which had been "fixed."

The clear distinction in the case at bar which renders the *Thompson* case inapplicable is, that the right to future payments under the Certificate is not "fixed." The right to payments is qualified by the terms of the Certificate, being subject to the condition precedent that the Beneficiary shall not remarry. It is specifically provided that, if she remarries, "payment shall cease." The changed condition brought about by remarriage, which act is solely within the volition of the plaintiff, in and of itself defeats the right to any future payments. With such a condition we submit that the future payments are not "fixed."

POINT III.

THERE IS NO DECISION OF THIS COURT NOR OF A CIRCUIT COURT OF APPEALS DECIDING THE QUESTION AS TO WHETHER OR NOT FUTURE CONTINGENT PAYMENTS MAY BE RECKONED TO ACQUIRE THE REQUISITE JURISDICTIONAL AMOUNT.

We have been unable to find any decision of this Court or of a Circuit Court of Appeals directly deciding the question as to whether or not contingent future payments may be reckoned in order to acquire the requisite amount to confer jurisdiction in the Federal Court. The *Thompson* case, *supra,* is not in point as this Court held the future payments therein were not contingent or speculative but were fixed. By relying on that case the Circuit Court erred in the case at bar, unless it held the payments are not contingent despite the plain contingency with respect to remarriage.

If contingent future payments may be reckoned to acquire the jurisdictional amount it is to be anticipated that many cases on insurance policies, providing for future payments contingent upon continued disability, will clog the federal court dockets. The duration of the disability is obviously speculative and impossible of definite determination. Even more speculative is the possible date of remarriage of plaintiff in the case at bar, as the event is within her volition. Such a holding would appear to be in derogation of the rule of strict construction under which, in cases where the judgment will work an estoppel as to amounts greatly in excess of the jurisdictional amount, jurisdiction has been repeatedly denied because the effect is collateral, as in the *Wright* case, *supra.* In the general interest this important question should be settled by this Court.

CONCLUSION.

We, therefore, respectfully submit that a Writ of Certiorari should be granted to review the decision of the United States Circuit Court of Appeals for the Sixth Circuit because of the importance of the question involved which has not been decided heretofore; because the decision is contrary to the weight of authority, in conflict with applicable decisions of this Court and is probably untenable.

Respectfully submitted,

THOMAS STEVENSON,

Attorney for Petitioners.

PETITIONERS' BRIEF

FILE COPY

SEP 17

In the Supreme Court of the United States

OCTOBER TERM, 1934.

No. 32.

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BRIEF OF PETITIONERS.

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INDEX.

Opinions of the courts below 1

Jurisdiction 1

Statement of the case 2

Specification of errors 6

Synopsis of Argument 7

Argument 7

Conclusion 16

Authorities Cited.

Dunbar v. Dunbar, 190 U. S. 340; 23 Sup. Ct. 757; 47 L. Ed. 1084 ..... 12, 13

Eberhard, et al. v. Northwestern Mutual Life Insurance Co., 241 Fed. 353 10

Elgin v. Marshall, 106 U. S. 578 16

Fields v. Equitable Life Ins. Co., 199 N. Car. 454; 154 S. E. 738 16

Guardian Life Insurance Co. v. Johnson, 186 Ark. 1019; 57 S. W. (2d) 555 16

Herold v. Shanley, 146 Fed. 20 14

Kithcart v. Metropolitan Life Ins. Co.: Kevan v. John Hancock Mutual Life Ins. Co., 1 Fed. Supp. 719 .. 16

LaVecchia v. Conn. Mut. Life Ins. Co. of Hartford, Conn., 1 Fed. Supp. 588 16

Lyon Bonding Company v. Karatz, 262 U. S. 77 ..... 7, 10

Mutual Life Ins. Co. of New York v. Wright, 276 U. S. 602 16

Reliance Life Ins. Co. v. Capital National Bank, 38 Ga. App. Rep. 349; 143 S. E. 924 16

Shanley v. Herold, 141 Fed. 423..... 13

Thompson v. Thompson, 226 U. S. 551.....
.....5, 6, 9, 11, 13, 14, 15, 16

In re Westmoreland, 4 Fed. (2d) 602..... 14

Wyll v. Pacific Mutual Life Ins. Co. of Calif., 3 Fed. Supp. 483..... 16

Judicial Code, Sec. 37; 28 U. S. C. A. Sec. 80; 36 Stat. 1098 8

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ELLA E. PINKSTON,

Respondent.

BRIEF OF PETITIONERS.

OPINIONS OF THE COURTS BELOW.

The opinion of the United States Circuit Court of Appeals for the Sixth Circuit is reported in 69 Fed. (2) 600 and is found in the Transcript of Record at page 113. The opinions of the United States District Court for the Northern District of Ohio, Eastern Division, are not reported but are found in the Transcript of Record at pages 93 and 96.

JURISDICTION.

This cause is before this Court as a result of a Petition for Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit, granted by this Court; 54 Sup. Ct. Rep. 866. The date of the judgment to be reviewed is March 8th, 1934.

STATEMENT OF THE CASE.

The Petitioner, Brotherhood of Locomotive Firemen and Enginemen, is a voluntary association of men employed as locomotive firemen and enginemen, a hazardous occupation, and is a labor union. It operates and has operated several departments in the nature of fraternal benefit societies, one of which was designated the Widow's Pension Department. The Constitution of the Brotherhood provided that the Department should be self-sustaining, should be entirely separate from all others and should in no way create a financial liability for any other Department. (R. 75.) The Department was so operated from January 1st, 1926 up to July 31st, 1931.

The Certificates issued by the Widow's Pension Department provided that, in the event of the death of the member, his widow shall be entitled to the benefits set forth in such Widow's Pension Department. (R. 66.) As benefits, the Widow's Pension Department provided that the beneficiary "shall be entitled to receive from the funds of this Department a pension of Thirty Five Dollars ($35.00) per month during her life time, provided she does not remarry. Should she remarry, the payment of such pension shall cease." (R. 77.)

An actuarial study of the Department and its experience, made in 1930, disclosed it was only about Five Per Cent (5%) solvent. At that time, there were about 6,000 members paying dues into the Department and about 78 beneficiaries holding matured certificates and in receipt of benefits. Assets in the Department were about $313,000.00 while the liabilities on account of claims then being paid amounted to over $327,000.00.

In view of that situation it was resolved by the Brotherhood at its Convention in June and July, 1931, to discontinue the Department as of August 1st, 1931. Briefly stated, the action of the Convention was that the Presi-

dent and General Secretary and Treasurer undertake to make lump sum settlements with each matured Certificate holder, not to exceed $1500.00; where the beneficiary declined such settlement the monthly allowance was to be paid from the new Benevolent Fund provided the monthly payments must continue under the Insurance Laws of the states and that, after such settlements had been made, any remaining assets be distributed to the members of the Department. The same Convention established a new Benevolent Fund, compulsory upon all members of the Brotherhood, about 80,000 at that time.

The President of the Brotherhood is given authority by its Constitution to interpret the provisions thereof, such interpretation being made final unless modified or reversed by the ensuing Convention. (R. 37.) The President interpreted the action of the Convention to mean that widows would first be settled with or provision made to take care of the matured claims out of the fund before anything further was done. (R. 39.)

In proceeding to carry out the resolution of the Convention, a communication was sent to each beneficiary on July 30th, 1931, advising of the action of the Convention and making certain inquiries. (R. 68.) The respondent, a beneficiary, failed to answer the communication and refused to give the Brotherhood any information. A copy of the letter was sent to the respondent on September 10th, 1931 (R. 85), and the response was a conference with her attorneys and the filing of the Bill of Complaint herein on September 29th, 1931.

The Bill of Complaint does not directly and specifically allege the jurisdictional amount. An attempt is made in Par. 2 of the Complaint (R. 1) but the weakness and defect in the allegation is readily apparent. The allegation is "that the value of the matter in dispute herein *as hereinafter shown* is in excess of $3,000, exclusive of interest and

costs." This allegation obviously requires additional allegations to be made and considered from which a conclusion can be reached as to the value of the matter in dispute. In fulfillment of this requirement it is thereafter alleged that plaintiff is entitled to receive a pension of "$35.00 per month during her lifetime, and *as long as she should not remarry*" (R. 3); that she is 40 years of age and that, based upon her life expectancy, her claim has a net present value in excess of $5,000. (R. 5.)

It may here be noted that, in the Complaint originally filed, there was no allegation that complainant had not remarried. To conform to the condition pleaded that payments continue only so long as the beneficiary remains unmarried, this essential allegation was supplied only after a ruling of the District Court on the defendant's Motion to Dismiss the Bill. (R. 3, 13.)

As indicated, the defendant interposed a Motion to Dismiss the original Bill of Complaint. This was predicated on two grounds (1) misjoinder of parties, and (2) that the Bill did not state facts sufficient to constitute a valid cause of action in equity. (R. 10.) This Motion was overruled by the District Court said court pointing out that the lack of the essential allegation that the plaintiff had not remarried had been covered by an amendment. (R. 13.) The case was then heard on the merits and, at the opening of the hearing, the defendant immediately raised the question that the jurisdictional amount was not involved. The Court held that question had been ruled upon in its refusal to dismiss the Bill of Complaint. (R. 26.)

The plaintiff undertook, through the testimony of an actuary, to prove the value of her individual claim. (R. 33.) No competent testimony was introduced as the opinion or estimate of the actuary as to the present value of the claim of the plaintiff was based entirely upon her life

expectancy and did not take into consideration the condition that the annuity would terminate in the event the plaintiff remarried. (R. 34.) At the close of the plaintiff's case the defendant renewed the Motion to Dismiss on failure of proof which was overruled by the Court. (R. 35.) The defendants renewed their Motion for a verdict at the close of the hearing which was overruled. (R. 65.)

Briefs were then filed on consideration of which the District Court dismissed the cause without prejudice in a Memorandum Opinion. (R. 93.) A Motion for a Rehearing was filed, the matter again briefed and the District Court adhered to its former view it had not jurisdiction in another Memorandum Opinion. (R. 96.)

The plaintiff appealed the case to the United States Circuit Court of Appeals for the Sixth Circuit. That Court reversed the Decree of the District Court and remanded the cause back for further proceedings. (R. 113.)

As the plaintiff had undertaken to bring the case as a class or representative action, the Circuit Court of Appeals, in its decision, specifically held that the matter in controversy is the value of the individual rights of the plaintiff under her individual certificate and is not the accumulated Pension Fund nor the combined claims of all the holders of matured Certificates. (R. 114.) The decision of the Circuit Court of Appeals reversing the case is based solely on one decision of this Court which is held to be controlling. *Thompson v. Thompson,* 226 U. S. 551. (R. 115.) An additional factual situation might here be referred to. The Defendant filed a Petition for Rehearing in the Circuit Court of Appeals. (R. 116.) In connection with that Petition for Rehearing one of the defendants, the General Secretary and Treasurer of the defendant Brotherhood filed an affidavit to the effect that, with the exception of five (5) widows, of whom the plaintiff was one, all the holders of matured Certificates had made settlement of

their claims. The affidavit also stated that each of the five (5) remaining widows, including plaintiff, had been and is being paid monthly benefits in accordance with the terms of the Certificate which she holds.

On that state of facts and, as the plaintiff was receiving and accepting all payments due her under her Certificate it was represented by defendant that the case had become moot and on that ground should be dismissed by the Court. In its decision, the Circuit Court held that the controversy had not become moot (R. 116), and the Petition for Rehearing was denied. (R. 122.)

SPECIFICATION OF ERRORS.

The issue in this case is well defined and may be stated as follows: Where a Complainant (widow) 40 years of age, with a life expectancy of twenty-six (26) years, is the holder of a Pension Certificate providing payment of Thirty Five Dollars ($35.00) per month for life, providing she does not remarry (payment to cease if she remarries), may such future contingent payments be reckoned during life expectancy in order to confer jurisdiction on the Federal Court?

The District Court held such future contingent payments cannot be reckoned and that it was without jurisdiction. The Circuit Court of Appeals reversed that holding, ruling that the decision of this Court in *Thompson v. Thompson,* 226 U. S. 551, is controlling. We believe that the Circuit Court erred in holding that decision to be controlling and misconstrued the purport of the decision.

While the argument in this brief will be addressed to the foregoing question we submit the Circuit Court of Appeals also erred in holding that the case had not become moot.

SYNOPSIS OF ARGUMENT.

The amount necessary for federal jurisdiction cannot be predicated on future claims which are contingent in nature and may never accrue. The decision of this Court relied upon to sustain jurisdiction in the case at bar specifically holds that the future payments therein provided by a court order were not contingent, but fixed. In a matured Pension Certificate, entitling the widow beneficiary to receive a pension of Thirty Five Dollars ($35.00) per month during her life time, provided she does not remarry, all payments are contingent. Future payments depend entirely upon the volition of the beneficiary and may never accrue. The probability of remarriage cannot even be conjectured and it is impossible to estimate the present value of such contingent payments. Being predicated upon a stated contingency, the happening of which will automatically terminate the right to payments, future payments under such a Pension Certificate cannot be considered or reckoned for the purpose of acquiring the jurisdictional amount.

ARGUMENT.

The sole jurisdictional question in this case and now before this Court is clearly defined by the Opinion of the Circuit Court of Appeals. As the plaintiff was urging additional grounds as the basis of the jurisdiction of the Federal Court, such as the amount of the accumulated Pension Fund and the combined claims of all the holders of matured Certificates, the Circuit Court eliminated those contentions by specifically holding that neither of those matters constitute the matter in controversy. This was on the authority of *Lyon Bonding Company v. Karatz,* 262 U. S. 77. The Court then stated that the rights which Appellant seeks to have protected, that is, her rights under the Certificate which she holds, is the matter in controversy.

Ordinarily we would not be disposed to challenge or question the statement of facts made by opposing counsel but, by reason of the errors and omissions in the Statement of the Case in the brief of Respondent opposing the Petition for Writ of Certiorari, it would appear fitting they now be pointed out in order that we will not be placed in the position of oppearing to acquiesce by silence. While it may not be of any materiality, counsel for plaintiff state on page 4 of their brief

> "Notwithstanding that the Petitioners had failed in their answer or otherwise to raise *any* jurisdictional question, the District Court, *of its own initiation,* after hearing the case on its merits, ruled that the amount in controversy was less than $3,000, and thereupon dismissed the case for want of jurisdiction, etc." (Italics ours.)

Even if of any moment in view of Judicial Code, Sec. 37; 28 U. S. C. A. Sec. 80; 36 Stat. 1098, such a sweeping statement is at variance with the record as outlined in the foregoing statement of the case. The defendants filed a Motion to Dismiss (R. 10), in their Answer specifically denied the allegations of Par. 2 of the Complaint attempting to allege the value of the matter in dispute (R. 14), in their opening statement raised the question of jurisdictional amount which the Court stated had been passed upon (R. 26) and renewed the Motion to Dismiss at the end of plaintiff's testimony. (R. 35.) In view of such a record it is difficult to see how counsel can seriously make the statement that Petitioners had failed "in their answer or otherwise to raise *any* jurisdictional question" and that the District Court dismissed the case of its own initiative.

On the same page of their brief counsel for respondent suggest that the following statement contained in the Petition for Writ of Certiorari is misleading.

> "The court found as a fact that the matter in controversy does not exceed the sum of $3,000."

In answer we simply refer to the precise language of the Order of the District Court dismissing the case (R. 99) where the language is used:—

> "And the Court *now finding as a fact* that the matter in controversy does not exceed the sum or value of $3,000 exclusive of interest and costs and as a conclusion therefrom that it has no jurisdiction hereof etc." (Italics ours.)

In addition to this precise language of the Order reference might also be made to the Assignment of Errors filed by Respondent in which the first assignment (R. 108) is:—

> "that the Court erred in *finding as a fact* that the matter in controversy does not exceed the sum or value of $3,000.00 exclusive of interest and costs." (Italics ours.)

The literal effect of the decision of the Circuit Court of Appeals in this case is that the benefits provided for in the Certificate are not contingent and therefore the decision of this Court in *Thompson v. Thompson, supra,* is controlling. If this is the correct meaning, it calls for a consideration of the precise language of the Constitution of the Brotherhood controlling the benefits as provided by the Certificate. It is there provided that a beneficiary

> "shall be entitled to receive from the funds of this department a pension of Thirty Five Dollars ($35.00) per month during her lifetime, provided she does not remarry. Should she remarry, the payment of such pension shall cease." (R. 77.)

Obviously, this language does not provide for unconditional payments. The right to *any* payment is circumscribed by a condition. The beneficiary is entitled to a payment only "provided she does not remarry." Manifestly, if she remarried immediately after the death of her husband she would not be entitled to any payment.

It may be argued that the concluding sentence "should she remarry, the payment of such pension shall cease" is a defeating clause, but we submit it has no bearing upon the *right* of the beneficiary to payment. It is merely a provision that the named beneficiary alone has the conditional right to payment and that, when she has no further right to payment, there is no other claim against the fund under the Certificate.

It is with great diffidence we approach a discussion of the opinion of the Circuit Court of Appeals. That Court, however, brought the decision to one well defined point by first carefully excluding from consideration either the accumulated Pension Fund or the combined claims of all matured Certificate holders. The Court held that jurisdiction of the Federal Court rested solely upon the Respondent's right under the Certificate which she holds. The Court could not well do otherwise in view of former decisions.

In the case of *Eberhard, et al. v. Northwestern Mutual Life Insurance Co.,* 241 Fed. 353, an almost identical situation was presented for the consideration of the Circuit Court of Appeals for the Sixth Circuit. The Court there held that neither the accumulated fund nor the aggregate amount of the claims of the several complainants were the test of jurisdiction. The individual plaintiff must bring into court an amount in excess of $3,000.

That case was cited with approval by this Court in *Lyon Bonding and Surety Company v. Karatz,* 262 U. S. 77. In that case an almost identical situation on the question of jurisdictional amount was presented to this Court. Plaintiff's claim against the company was $2100.00 and this Court held that the District Court was without jurisdiction as the requisite amount was not involved.

Although this suit is founded on the Certificate there is no prayer for recovery. It is not an action for damages

for the breach of the Certificate. As a matter of fact, at the time of the trial in the District Court as well as at the time of the hearing in the Court of Appeals the Respondent had been paid up to date under her Certificate, and had accepted such payments, upon her allegation that she had not remarried. It is an action in equity seeking relief in the nature of specific performance. Nevertheless, under the Opinion of the Circuit Court of Appeals, it is the value of complainant's rights under her Certificate which must constitute the jurisdictional amount.

Although any and all rights under the Certificate are conditional, being predicated on the provision that she does not remarry, the Circuit Court held these payments were not contingent or speculative upon the sole authority of *Thompson v. Thompson, supra.* In that case, in a separate maintenance suit, the Supreme Court of the District of Columbia directed the husband (defendant) to pay $500.00 counsel fees and $75.00 a month for the maintenance of his wife and child. The Court of Appeals of the District reversed the decree and the wife appealed to this Court. The husband (defendant) contended this Court lacked jurisdiction because it could hear only causes in which the matter in dispute, exclusive of costs, exceeded the sum of $5000.00. At the time the case was decided the accrued payments did not amount to the necessary $5,000 but this Court held that, considering the expectancy of the lives of the parties, the prospective payments were sufficient to make up the jurisdictional amount.

Obviously, in that case, jurisdiction depended entirely upon the determination of the question as to whether or not the monthly payments for maintenance of the wife and child provided for under the order of the court, were contingent. The husband contended that such future payments were contingent for the reason that the court order was

subject to change. In rejecting these contentions this Court said:—

> "Nevertheless, *such a decree* clearly and finally *settles* the obligation of the husband to contribute to the support of the wife and offspring, and *fixes* the amount of contribution required for the present to fulfill that obligation. *The future payments are not in any proper sense contingent or speculative,* although they are subject to be increased, decreased, or even cut off as just indicated." (Italics ours.)

We submit that the very necessity for this Court to rule on such a question as presented in that case clearly indicates it to be an exception from a well established rule. The impossibility of estimating the value of future payments terminating upon remarriage had been considered and passed upon by this Court in a matter not bearing upon jurisdiction. This was in connection with proving such claims under the Bankruptcy Act. The leading case appears to be *Dunbar v. Dunbar,* 190 U. S. 340; 23 Sup. Ct. 757; 47 L. Ed. 1084.

In that case, decided in 1903, the divorced husband had entered into an agreement with his divorced wife to pay her an annuity "during her life or until she remarries." The divorced husband subsequently went through bankruptcy and later set up his discharge in bankruptcy as a bar to claims under that agreement. The difficulties of placing any value upon the future claims based upon remarriage are fully discussed. At page 345 this Court said:—

> "But how can any calculation be made in regard to the continuance of widowhood when there are no tables and no statistics by which to calculate such contingency? How can a valuation of a probable continuance of widowhood be made? Who can say what the probability of remarrying is in regard to any particular widow? We know what some of the factors

might be in the question: inclination, age, health, property, attractiveness, children. These would, at least, enter into the question as to the probability of continuance of widowhood, *and yet there are no statistics which can be gathered which would tend in the slightest degree to aid in the solving of the question.*" (Italics ours.)

In further discussion this Court said, page 346:

"Taking the liability as presented by the contract, if the mortality tables were referred to for the purpose of ascertaining the value so far as it depended upon life, the answer would be no answer to the other contingency of the continuance of widowhood; and if, having found the value as depending upon the mortality tables, you desire to deduct from that the valuation of the other contingency, *it is pure guesswork to do it.*" (Italics ours.)

If, as so conclusively shown by this Court, it is impossible to place any value upon future payments based upon the contingency of remarriage for the purposes of a discharge under the Bankruptcy Act, how much less can any attempt be made to place a value on such future payments for the purpose of acquiring federal jurisdiction? The strict rule of construction with respect to jurisdictional amount and the presumption against it requires the amount to be present almost with certainty and not based upon pure guesswork.

We have been unable to find that the doctrine of the *Dunbar* case, *supra,* has been modified in any way by this Court. It was not modified or relaxed by the decision of this Court in the *Thompson* case, *supa.* As a matter of fact, the *Thompson* case was and is clearly distinguished. There was no contingency whatever in the Court Order in the *Thompson* case.

On the other hand, the doctrine of the *Dunbar* case has frequently been followed. In *Shanley v. Herold,* 141

Fed. 423, involving a question of taxation, at page 429 the court said:—

> "The interests in question of the legatees were determinable not only by the death of the widow, but also by her remarriage. It is apparent therefore that the interests might terminate at any time, *and that there is consequently no way to fix or determine their present value.* No tables have ever been calculated which will show the time, when, if ever, a widow will remarry." (Italics ours.)

Again in *Herold v. Shanley,* 146 Fed. 20, in criticizing the use of mortality tables in such a case the court, at page 24 said:—

> "Still further, if the use of mortuary tables were permissible in a proper case, they should not have been used here, for one of the contingencies contemplated by the will was the remarriage of the widow, and, while the probability of death may perhaps be approximately estimated from the recorded experience of insurance companies, *there are as yet no statistics available from which the probability of remarriage may even be conjectured.*" (Italics ours.)

In a still later case, *In re Westmoreland,* 4 Fed. (2d) 602, in discussing the basis for the settlement of a decree for alimony which ran during life and non-marriage the Court, at page 603 said:—

> "She cannot be settled with at once without her consent, because no court can estimate the present value of a right conditioned as hers is."

If there is any stated contingency which will automatically terminate the future payments, it would seem clear that the future payments are positively contingent and speculative. In the *Thompson* case, there was no condition stated in the Court Order which would of its own force defeat the future payments. The contention was that the Court making the Order had the power to amend or

modify it even to the extent of entirely cutting off the payments. It is quite obvious, however, that the payments were as "fixed" as humanly possible. An independent authority must act in order for there to be any change. There was no stated condition that would *ipso facto* terminate payments.

It is difficult to see how that decision can be held controlling of the case at bar. In this case the right to any future payments is predicated upon a clear condition,—"remaining unmarried." This condition is entirely within the volition of plaintiff and she may disqualify herself at any time. The apparent fallacy of the holding that the future payments in the case at bar are *not* contingent or speculative would appear to be fully disclosed if the condition had been fulfilled and the Respondent had actually remarried subsequent to the decision of the District Court and prior to the hearing in the Circuit Court of Appeals. Under such circumstances, could the Court of Appeals have held that the right to future payments, already defeated by the Respondent herself, still rendered the future payments "fixed," under the reasoning of the *Thompson* case?

Furthermore, the ruling of the Circuit Court of Appeals herein is also at variance with the decisions of other Federal Courts, also state courts of last resort in denying Federal jurisdiction in analogous cases. We refer to the cases that have been brought upon insurance policies alleging total and permanent disability where Federal jurisdiction has been sought to be predicated upon future payments during the life expectancy of the insured. The decisions are consistent and unanimous that the alleged future benefits are too speculative to be based on life expectancy, being defeated by recovery, and cannot be reckoned to acquire the jurisdictional amount in the Federal Courts.

LaVecchia v. Conn. Mut. Life Ins. Co. of Hartford, Conn., 1 Fed. Supp. 588;

Wyll v. Pacific Mutual Life Ins. Co. of Calif., 3 Fed. Supp. 483;

Kithcart v. Metropolitan Life Ins. Co.: Kevan v. John Hancock Mutual Life Ins. Co., 1 Fed. Supp. 719;

Reliance Life Ins. Co. v. Capital National Bank, 38 Ga. App. Rep. 349; 143 S. E. 924;

Guardian Life Insurance Co. v. Johnson, 186 Ark. 1019; 57 S. W. (2d) 555;

Fields v. Equitable Life Ins. Co., 199 N. Car. 454; 154 S. E. 738.

It would be a work of supererogation to argue to this Court in support of the rule of strict construction for Federal jurisdiction. There has been no deviation from the rule as announced by this Court in *Elgin v. Marshall*, 106 U. S. 578, that all doubts must be resolved against the jurisdiction of the Federal Courts, as the Judiciary Act was intended to contract the jurisdiction. The case of *Thompson v. Thompson* is not a relaxation of that rule but merely a finding that, under the facts in that case, it came within the rule. The rule was recently re-affirmed by this Court in *Mutual Life Ins. Co. of New York v. Wright*, 276 U. S. 602.

CONCLUSION.

Federal jurisdiction herein rests solely on future payments which are contingent upon the complainant not remarrying. There are no tables or statistics which can be gathered which would aid in establishing the value of such future payments. The probability of remarriage may not even be conjectured. Any attempt to fix a value of such future payments is pure guesswork.

WHEREFORE, in view of the presumption against the existence of federal jurisdiction and the necessity of the jurisdictional amount to affirmatively appear it is respectfully submitted that the judgment of the Circuit Court of Appeals rendered in this cause should be reversed and the judgment rendered by the United States District Court for the Northern District of Ohio, Eastern Division, should be affirmed.

Respectfully submitted,

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Counsel for Petitioners.